STATE OF MICHIGAN
17TH CIRCUIT COURT

DONALD A. JOHNSTON
CIRCUIT JUDGE

SUITE 11500 D
180 OTTAWA AVENUE NW
GRAND RAPIDS, MICHIGAN 49503-2751

August 19, 2009

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2009-11, Proposed Amendment to MCR 6.302(C)(1)

Dear Mr. Davis:

I note from page 68 of the August 2009 issue of the *Michigan Bar Journal* that the Supreme Court is considering an amendment to MCR 6.302(C)(1), to add the sentence: "All discussions regarding defendant's plea must take place in open court and be placed on the record."

While I appreciate the stated purpose, "to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence", I am concerned that the language of the proposed amendment is overly broad. Literally construed, it would prevent defense counsel from discussing the ramifications of a plea offer with the defendant in private and off the record. Similarly, it would preclude defense counsel and the prosecutor from discussing possible plea offers anywhere other than in the courtroom, in the presence of the judge, and on the record.

More importantly, I fear that it might preclude Kent County from continuing the use of our very popular and highly productive "status conferences" in criminal cases. Each of our criminal/civil judges conducts criminal status conferences in new cases one afternoon each week. Defendants out on bond are ordered to appear, and incarcerated defendants are brought over from the jail. While defendants wait in the courtroom, defense counsel and the prosecutor meet with the judge in chambers to candidly discuss the strengths and weaknesses of each case, and to nail down the details of precisely what plea offer the prosecutor is prepared to extend. After defense counsel has had the opportunity to confer in private about the offer with the defendant, the judge takes the bench and convenes court; the plea offer is spelled out clearly and fully on the record, and the defendant and counsel are asked whether they wish to accept the offer or proceed to trial. If the defendant accepts the offer, the plea is then taken; if not, the case is set for trial.

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We adopted this process because we found that defense counsel and prosecutors were not getting together to evaluate their cases, and discuss possible offers, until the day of trial. This resulted in many cases being needlessly set for trial which were bound to plead eventually anyway, and caused lengthy delays in scheduling trials in those cases which needed to be tried. Once the court took control of the process by holding status conferences soon after the cases were bound over from district court, we found that we were able to dispose of the vast majority of cases, and to set trials in the contested cases, much sooner than previously. In addition, we have eliminated the previous problem of defendants, after being convicted and sentenced for serious crimes, claiming that their attorneys never made clear to them what plea offer they could have had in lieu of going to trial.

I certainly don't object to measures being adopted "to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence", but I don't want us to be forced to give up our status conferences either. Likewise, I don't want to force defense counsel to discuss all ramifications of a given plea offer with the defendant in open court with all and sundry looking on, and I don't want to prohibit defense counsel and the prosecutor from engaging In negotiations outside of the courtroom.

Perhaps the language of the proposed amendment could be narrowed to something like, "All discussions ***between counsel, the defendant and the court*** regarding a defendant's plea must take place in open court and be placed on the record."

I appreciate the willingness of the Supreme Court to entertain and consider these comments.

Sincerely yours,

Donald A. Johnston
Circuit Judge
Chief Judge Pro Tempore